COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

April 3, 2007

In the Matter of Hercules Chemical Company	Docket No. 2006-180 File No. 115766
In the Matter of Hercules Chemical Company	Docket No. 2007-043 File No. W103000

RECOMMENDED FINAL DECISION

These are appeals concerning two separate Departmental actions under Title 5. The first is an appeal of the Department's removal of the petitioner's product "Aid Ox" from the list of approved septic system additives pursuant to 310 CMR 15.027. By letter dated August 17, 2006 the Department notified the petitioner that it had reviewed Aid-Ox and determined that one of its components – Sodium Percarbonate – may harm a septic system component (the biomat) and adversely affect system function and the environment.[1] The letter then indicated that the agency

[1] 310 CMR 15.027(3) provides: "The Department ***may*** allow a septic system additive when it is demonstrated to the Department's satisfaction that the additive will not: (a) harm the components of the system; (b) adversely affect the functioning of the system; or (c) adversely affect the environment." (emphasis added).

intended to withdraw its approval of Aid Ox as an additive, and described a process for submitting additional evidence concerning the applicable criteria and the Department's conclusion, a process the petitioner undertook. On September 13th and 26th the petitioner submitted additional information concerning its product and the standards for approval as an additive under 310 CMR 15.027(3).

The Department responded by letter on October 13, 2006 and concluded "your product Aid-Ox is intended for use on systems exhibiting sluggish behavior or failing to adequately transmit wastewater through the subsurface biomat and soils. The product in your description is meant for use as a system restorative… beneficial for a system that is failing due to a restrictive biomat. This information also describes a restoration process of a failing system." The letter then provided the regulatory definition of system failure and states "Title 5 does not allow the repair or upgrade of failing systems through the use of septic system additives". The agency then stated it would remove Aid-Ox from its list of approved additives. This appeal followed (Docket No. 2006-180).

The Department' s October 13th letter also suggested that Aid-Ox might be approved as a soil absorption system "restorative" under 310 CMR 15.028 through the innovative and alternative technologies program. The petitioner followed this suggestion and applied for approval of Aid-Ox as a absorption system restorative. The agency denied the application (BRP WP 62) as an "additive/restorative" on January 2, 2007 on the basis that "the product's chemical composition may harm the soil absorption system biomat and/or soil structure."[2] That decision is the subject of the second request for an adjudicatory hearing (Docket No. 2007-043).

[2] 310 CMR 15.028(2) prohibits the use of "any physical, chemical or biological treatment process to restore or condition a soil absorption system that has not been approved by the Department for use as an alternative system pursuant to 310 CMR 15.280 through 15.288.

The Department filed a Motion to Dismiss on the grounds that no right to appeal the additive determination exists, relying on the provisions of M.G.L. c.21A §13 and 310 CMR 15.422, neither of which specifically mention an appeal right for this type of decision. The petitioner argues that the decision is an "Order" for which an appeal right is specified in 310 CMR 15.422(2). Alternatively the petitioner argues the decision is an "alternative technology, a remedial use [or] a certification of general use …. determination" for which an appeal right is provided in 310 CMR 15.422(1).

The regulations allow appeals of certain listed Departmental determinations at 310 CMR 15.422. They include determinations concerning "a shared system, recirculating sand filter or equivalent alternative technology, a remedial use, a certification for general use, or [a] variance". 310 CMR 15.422(1). Orders are also subject to appeal. 310 CMR 15.422(2).

Delisting Aid-Ox from the Department's list of approved additives under 310 CMR 15.027 was neither an Order (under 15.026), nor a recirculating sand filter or equivalent alternative technology determination (under 15.202), remedial use determination (under 15.284) or a determination regarding certification for general use (under 15.288). The denial of the petitioner's application for approval as an additive/restorative was similarly none of the appealable determinations listed in 310 CMR 15.422.

An Order, described at 310 CMR 15.026, requires the person to whom it is issued to "come into compliance with the provisions of 310 CMR 15.000 or to take any other action necessary to protect public health, safety, welfare or the environment." 310 CMR 14.026(1). See also Matter of David and Louise Fitzgerald, Docket No. 2001-117, Recommended Final Decision, March 21, 2002 , Adopted by Final Decision April 1, 2002 [provisional use denial at specific location is not an order and not subject to a right of appeal]. Neither the October 13,

2006 decision to delist Aid-Ox, nor the denial of the product as an additive/restorative, required any action, and were therefore not Orders subject to appeal under 310 CMR 15.422(2).

The determinations appealed are not determinations concerning recirculating sand filters (RSFs), and the petitioner's submittals do not assert that its product is a technically equivalent to an RSF.[3] RSFs and technologies deemed equivalent to RSFs or may be used as provided in 310 CMR 15.202, and as approved through the innovative/alternative technology provisions of 310 CMR 15.280 – 288 (Form BRP WP 57). Neither of the appealed Aid-Ox determinations were made pursuant to 310 CMR 15.202 or 15.280-288.

Remedial use determinations made under 310 CMR 15.284 and general use certifications under 310 CMR 15.288 are subject to appeal through 310 CMR 15.422(1). Remedial use approval of a system or technology is intended to "allow for the rapid approval of an alternative system that is likely to improve existing conditions at a particular facility or facilities currently served by a failed, failing or nonconforming system." 310 CMR 15.284, Form BRP WP 64C and 61A). The sequence of approval for piloting (310 CMR 15.285), provisional approval (310 CMR 15.286), and certification for general use (310 CMR 15.288), is intended to provide a process through which proponents of an alternative system may have that system approved for general usage in the Commonwealth, including use for new construction." 310 CMR 310 CMR 15.281(4), Form BRP-WP 61B. Neither remedial use approval nor certification for general use were involved in the Aid-Ox determinations appealed. The Department suggested in its January 2, 2007 denial that approval of Aid-Ox as an innovative/alternative technology might be pursued through "controlled testing of the product under the MassDEP innovative and alternative technology program to evaluate the product's potential for future consideration by MassDEP for

[3] Recirculating sand filters are defined as "A biological and physical treatment unit consisting of a bed of sand to which septic tank effluent is distributed and then collected in a recirculating tank prior to recirculating a portion through the sand bed filter and discharging a portion of the filtrate to the soil absorption system. 310 CMR 15.002.

use in the Commonwealth." Neither the delisting of Aid-Ox nor the denial of its use as an "additive /restorative" were made under the standards of the innovative and alternative technology provisions of 310 CMR 15.280 – 288, including the remedial use and general use certification standards.

For these reasons, I find that the Aid-Ox determinations appealed do not give rise to a right to request an adjudicatory hearing under 310 CMR 15.422.

Finally, the question of the timeliness of the petitioner's first Notice of Claim was raised by my Order to File a More Definite Statement. Although I find no right to an adjudicatory appeal for the additive delisting decision, or for the denial of the petitioner's additive/restorative application, I will also address this alternative basis for dismissal for lack of jurisdiction to consider the delisting decision appeal. The deadline for filing appeals is a jurisdictional matter that cannot be waived. Failure to file a request for an adjudicatory appeal within the prescribed time period requires dismissal of the claim. Matter of Sunoco Inc. (R&M), Docket No. 2003-035, Recommended Final Decision (September 16, 2003), adopted by Final Decision (October 1, 2003); Matter of Treasure Island Condominium Association; Docket No. 93-009, Final Decision, 11 MELR 1179 (May 13, 1993).

The Department's decision to delist was sent to the petitioner on October 13, 2006. The time period for filing a Notice of Claim, when no other provision of law applies, is 21 days from the date notice of the Department's action was sent. 310 CMR 1.01(6)(a). In this case that would mean a Claim would have had to be filed by November 3, 2006. The petitioner's Claim is dated November 10, 2006 and was received on November 13, 2006. If the Notice of Claim was sent (and filed) on the day it was dated (the earliest potential date in the record), November 10, 2006- the claim was filed seven days after the deadline.

The petitioner's response to the Order for a More Definite Statement contends that until the delisting actually occurred (alleged to have taken place on November 1st without any further evidentiary explanation) the time period for filing a Claim did not begin. This argument is unsupported by the regulations setting the time period for filing a claim which specify the period begins when "notice of Department's action" is sent. That notice was first sent in August 2006, and then again, after review of additional information submitted by the petitioner, on October 13, 2006. Notice of the intended action was clear, and the time it took to actually delete Aid-Ox from the list is not relevant to the applicable appeal period. Consequently, I also find that if there was a right to an adjudicatory appeal on the delisting decision, the petitioner's claim was untimely, and the Department lacks jurisdiction over that claim.[4]

I therefore recommend denial of the petitioner's motions to stay and consolidate, and granting the Department's Motion to Dismiss for lack of jurisdiction pursuant to 310 CMR 1.01(5)(a)15.f.iv and v.

NOTICE

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her final decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c.30A. The Commissioner's Final Decision is subject to rights and reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any portion of it, and no party

[4] There is no question that the petitioner's second request for an adjudicatory hearing filed January 19, 2007 was timely.

shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

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Ann Lowery
Presiding Officer

Adopted by Acting Commissioner Arleen O'Donnell April 4, 2007.